Abdul Kudus bin Hj Abd Aziz v Normah bte Cik

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO MT3-11-19 OF 1999
ZALEHA ZAHARI J
31 MARCH 2003

Evidence *— Documentary evidence — Agreed bundle — Agreed Bundle of Documents Part 2 — Document admitted as to authenticity but not as to content — Document provisionally marked 'ID' — Maker of document not called — Document not properly tendered in evidence — Effect of document not properly tendered in evidence — Whether trial judge erred in considering document in arriving at decision*

Evidence *— Witness — Cross-examination of witness — Failure to 'put' conflicting version to witness — Whether witness prejudiced*

A road traffic accident occurred at 6.30am at a traffic junction governed by traffic lights. The appellant was at the material time driving a motor car from Klang heading towards Kuala Lumpur while the respondent was crossing the road and heading to a bus stop on the other side of the road. The magistrate, in finding the driver 100% liable, relied on a sketch plan and key. She had also taken into consideration the fact that the defendant had been summoned and had paid the compound fine for traffic offences alleged against him. The magistrate also found that the appellant, who was coming from Klang and heading towards Kuala Lumpur, ought to have been driving on the left lane but had instead used the right lane which was a lane for traffic turning right into Taman Dato' Haron. Thus, the magistrate found the appellant negligent when he ran over the respondent who was crossing the road in the belief that the road was clear. The appellant appealed. Appellant's counsel argued, inter alia, that the magistrate had erred in relying on the sketch plan and key which had never been properly admitted in evidence. The sketch plan and key in this case were included in the second part of the bundle of documents, which meant that while authenticity of the document was admitted the contents were denied and the maker of the document had to be called as a witness. Respondent's counsel had intended to call the investigating officer ('IO') as a witness and introduce the sketch plan and key through him. However, the IO was not present and an adjournment was sought and obtained. Subsequently, the IO was not called as a witness. In the circumstances the sketch plan and key were marked 'ID' and was not properly admitted in evidence. Thus, the magistrate had erred in considering this evidence in arriving at her decision. As to the reliance on the fact that the summons against the appellant had been compounded, counsel submitted that the admission by the appellant that he had paid the compound in respect of the summons issued against him showed that the appellant was a truthful witness. Be that as it may, counsel was of the view that the defendant could not be held to be 100% liable as the court had to make a decision based on the totality of evidence adduced by both parties in this case. The appellant counsel highlighted the fact there

was no evidence before the court that the appellant was in the wrong lane at the material point of time. It was never put to the appellant in cross-examination that he was not in the right lane at the material point in time. The appellant also categorically stated that at the material point of time, on approaching the junction, the traffic light was not red, but green, in his favor. From a distance of about one chain, he saw the respondent crossing the road from right to left and that the respondent then suddenly retreated backwards. He tried to avoid her by braking but could not stop in time and collided into her.

Held, allowing the appeal with costs and apportioning liability equally:

(1) Having regard to the fact that the sketch plan and key was only admitted as to authenticity and its contents not admitted, and its maker not having been called as a witness, the court was in agreement with the submission that the magistrate had erred in taking it into consideration in making her decision (see p 176A–B).

(2) It was incumbent upon the High Court to make a considered decision based on the totality of the evidence adduced before it even in the light of the traffic summons which the appellant had compounded (see p 176B–C).

(3) If indeed the respondent's case was that the appellant was then driving on the wrong lane, during trial, this allegation should have been expressly 'put' to the appellant in cross-examination. The respondent's counsel's failure to do so has prejudiced the appellant (see p 176C–D).

(4) Coming on to the probabilities of this case, taking into consideration the fact that the respondent had admitted to seeing the light of the oncoming car before crossing, she clearly took a calculated risk in crossing the road when it was unsafe for her to do so. The court held that she was equally duty bound to take due care and attention not t cross the road in the face of the oncoming car. That in considering the probabilities of this case, the High Court held appellant's version was more probable (see p 176D–E).

[Bahasa Malaysia summary

Satu kemalangan jalan raya telah berlaku pada jam 6.30 pagi di suatu persimpangan jalan yang dikendalikan lampu isyarat. Perayu pada masa tersebut memandu sebuah motokar dari arah Klang menuju ke Kuala Lumpur semasa responden sedang menyeberangi jalan dan menuju ke perhentian bas yang terletak di seberang jalan. Majistret, dalam mendapati perayu pemandu yang 100% bertangungjawab, telah merujuk kepada suatu rajah kasar serta kunci. Ia telah mengambil kira fakta bahawa defendan telah disaman dan membayar

denda kompaun berkenaan kesalahan undang-undang trafik yang dihadapkannya. Majistret kemudian mendapati bahawa perayu, yang datang dari Klang menuju ke Kuala Lumpur, seharusnya memandu pada lorong di sebelah kiri jalan malah telah menggunakan lorong di sebelah kanan yang merupakan lorong bagi kenderaan berpusing ke kanan memasuki Taman Dato' Haron. Maka majistret mendapati perayu cuai dalam melanggar responden yang sedang menyeberangi jalan dengan kepercayaan bahawa jalan tidak ada kenderaan. Perayu telah merayu. Kaunsel perayu berhujah, antara lain, bahawa majistret telah melakukan kesilapan kerana bergantung pada suatu rajah kasar serta kunci yang tidak pernah dimasukkan dengan betul sebagai keterangan. Rajah kasar dalam kes ini termasuk dalam bahagian dua ikatan dokumen, yang membawa maksud bahawa walaupun ketulenannya diakui, isi kandungan dinafikan, dan pembuat dokumen tersebut perlu dipanggil sebagai saksi. Kaunsel responden memang bercadang memanggil pagawai penyiasat ('IO') sebagai saksi dan memasukkan rajah kasar melaluinya. Akan tetapi IO tidak hadir dan suatu penangguhan telah diminta dan dibenarkan. Seterusnya IO tidak pernah dipanggil sebagai saksi. Memandangkan sedemikian rajah kasar serta kunci hanya ditanda sebagai 'ID' dan tidak dimasukkan dengan betul sebagai barang kes. Maka majistret tersilap menimbangkan dokumen ini dalam membuat keputusannya. Bagi pergantungan kepada fakta yang saman terhadap perayu telah dikompaunkan, beliau berhujah bahawa pengakuan oleh perayu yang ia telah membayar denda yang dikenakan hanya menunjukkan bahawa perayu adalah saksi yang jujur. Walau bagaimanapun, beliau berpandangan defendan tidak boleh dikatakan bertanggungjawab 100% kerana mahkamah perlu membuat keputusan berasaskan kesemua keterangan yang dimajukan kedua-dua belah pihak dalam kes ini. Kaunsel perayu berhujah bahawa tiada sebarang keterangan dihadapkan di mahkamah bahawa perayu berada dalam lorong yang salah semasa kemalangan. Perayu tidak pernah di cabar semasa soal-balas bahawa perayu tidak berada di lorong yang betul semasa kemalangan. Perayu juga telah menegaskan bahawa pada sebelum kemalangan, semasa menghampiri persimpangan, lampu isyarat bukannya merah tetapi hijau, memihak kepadanya. Dari arah satu rantai ia nampak responden menyeberangi jalan dari kanan ke kiri dan bahawa responden tiba-tiba berundur kebelakang. Ia telah cuba menggelaknya tetapi tidak berjaya dan terus melanggarnya.

Diputuskan, membenarkan rayuan dengan kos dan mengagihkan liabiliti secara samarata:

(1) Memandangkan yang rajah kasar serta kunci hanya dimasukkan bagi ketulenan dan isi kandungannya tidak diakui, dan bahawa pembuat dokumen tersebut tidak dipanggil sebagai saksi, mahkamah ini bersetuju dengan hujah bahawa majistret telah melakukan kesilapan apabila mengambil kiranya apabila membuat keputusan (lihat ms 176A–B).

(2) Adalah masih perlu bagi Mahkamah Tinggi membuat suatu keputusan berasaskan kesemua keterangan yang dihadapkan ke mahkamah walaupun wujudnya keterangan saman trafik yang dikeluarkan ke atas perayu telah dikompaunkan (lihat ms 176B–C).

(3) Jika benar adalah kes responden bahawa perayu pada masa kemalangan sedang memandu dalam lorong yang salah, semasa perbicaraan, dakwaan ini mesti dihalakan ke perayu dalam soalbalas. Kegagalan kaunsel responden berbuat demikian telah memprejudiskan kes perayu (lihat ms 176C–D).

(4) Di atas kebarangkalian kes ini, mengambil kira fakta bahawa responden mengakui telah nampak cahaya kereta yang menghala kepadanya sebelum ia melintas, is telah mengambil risiko yang terkira dalam menyeberangi jalan semasa tidak selamat ia berbuat demikian. Mahkamah berpendapat responden juga adalah bertanggung jawab untuk menggunakan sikap berjaga-jaga dan perhatian yang wajar agar tidak menyeberangi jalan semasa di hadapan sebuah motokar menghala kepadanya. Dalam mengambil kira kebarangkalian kes ini, Mahkamah Tinggi mendapati versi perayu adalah lebih memadai (lihat ms 176D–E).]

Notes

For cases on agreed bundle of documentary evidence, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 995–1003.

For cases on cross-examination generally, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2427–2434.

Cases referred to

Mat Desa bin Salleh v Ang Hok Lee & Anor [1979] 1 MLJ 241 (refd)

Appeal from: Civil Suit No 73–39 of 1994 (Magistrate's Court, Shah Alam)

V Savithri Devi (*Kanga Suresh & Co*) for the appellant.
Alex Charles (*Nur Ashikin Alex & Rakan-Rakan*) for the respondent.

Zaleha Zahari J: The magistrate who made the decision which is the subject matter of appeal did not hear the evidence but made the decision based on notes of evidence recorded by the previous magistrate and written submissions filed.

In this situation, the general rule whereby an appellate court would normally be slow to interfere with the findings of fact arrived at by a trial judge by reason of having had the advantage of hearing the evidence, observing the demeanor of the witnesses, does not accordingly apply. This court, in exercising its appellate jurisdiction in this appeal is accordingly in the same position as the magistrate who made the decision on the facts in issue in this case.

A First, some preliminary issues. At the outset of the hearing of this appeal, I rejected the appellant counsel's oral application that the arguments in this appeal not be confined to liability by reason of the fact that the memorandum of appeal filed by the appellant includes the issue of quantum. I also dismissed the appellant counsel's oral application for extension of time of four years one month and 18 days from 23 December B 1998 to appeal on quantum and the oral application for leave to amend the notice of appeal to include quantum. To do so at this late stage in my view would be prejudicial to the respondent and the delay in this case being inordinate.

Thus, the arguments in this appeal was confined and proceeded on the C issue of liability only.

Next, I would like to deal with the contention on the part of the respondent counsel in his submission that the appellant had failed to plead contributory negligence and that it was not open for this court to consider apportioning liability. Upon perusal of the pleadings, I find this contention to be baseless. The pleadings shows that the appellant had raised the issue D of contributory negligence in para 4 of the statement of defence and had also particularized the same in the 'Particulars of Negligence'.

It is common ground that the accident in this case occurred on 23 September 1992 at about 6.30am at a road junction governed by traffic lights. The appellant was at the material time driving motor car No WBP E 359 from the direction of Klang to Kuala Lumpur whilst the respondent was in the course of crossing the road heading towards a bus stop situated on the opposite side of the road.

The magistrate's decision

F The magistrate's reasoning in finding the appellant 100% liable is in the grounds of decision at pp 9–10 of the appeal record. The magistrate relied on the sketch plan and key to sketch plan at pp 69–70 of the appeal record. He took into consideration, the fact that the defendant had been summoned and paid the compound in respect of the traffic offence G preferred against him. The magistrate then arrived at the following findings of fact ie that:

(a) the accident occurred whilst the respondent was crossing the road at a road junction governed by traffic lights;

(b) the accident occurred on the right lane immediately after the traffic H light at the road junction;

(c) the appellant who was proceeding from Klang towards the direction of Kuala Lumpur should have been driving on the left lane but had instead used the right lane which was for traffic turning right into Taman Dato' Haron;

I (d) the respondent had taken steps to ensure that the traffic from the direction of Taman Dato' Haron towards Kuala Lumpur was clear before she started crossing the road;

(e) the traffic light at the material point of time was red against the appellant and the appellant should have stopped his car at the said junction and that he had failed to do so;

(f) that the appellant was accordingly negligent in knocking into the respondent who was in the course of crossing the road in the believe that the road was clear.

The appellant counsel's submission

The appellant counsel's arguments were as follows. Firstly, she contended that the magistrate had erred in relying on a sketch plan and key to a sketch plan which was never produced. The sketch plan in this case was included in part two of the bundle, which means that the authenticity was admitted but its contents disputed, and the maker must accordingly be called as a witness.

On this issue the court's attention was drawn to p 50 of the appeal record where the respondent's counsel had sought for an adjournment due to the investigating officer not being present and that subsequently the investigating officer was never called as a witness. In this circumstance, she submitted that as the sketch plan and key was only marked as 'ID' and had been not tendered as an exhibit, the magistrate had accordingly erred in taking this document into consideration in making a considered decision in this case.

As to the reliance on the fact that the summons against the appellant had been compounded, she submitted this admission by the appellant that he had paid the compound in respect of the summons issued against him shows that the appellant was a truthful witness. Be that as it may, she was of the view that the defendant cannot be held to be 100% liable as the court has to make a decision based on the totality of evidence adduced by both parties in this case.

As is usual in cases of this nature, there are contradictory versions as to how the accident occurred. The appellant counsel was of the view that the plaintiff had not discharged the burden of proof that lies on her and that she failed to prove negligence on the part of the appellant.

The respondent (SP1) testified to crossing the road towards a bus stop at the opposite side of the road. In examination-in-chief, she testified that:

> Saya lihat kereta dari Taman Dato' Harun tiada, saya pun melintas. Tiba-tiba kereta Proton telah langgar saya. Motokar datang dari Klang ke Kuala Lumpur. Masa itu tidak hujan. Jalan terang lampu terang. Tiada kesesakan.

In cross-examination, the respondent testified that:

> Betul saya melintas dari kanan ke kiri (rajah kasar). Sebelum melintas saya tidak nampak motokar defendan. Jika saya nampak saya tidak akan melintas. Setuju jika tidak melintas kemalangan tidak akan berlaku kerana saya melintas jadi kemalangan ini berlaku. Tak setuju, saya tahu dari mana kereta itu datang. Kereta defendan tidak datang dari Taman Dato' Harun. Dari kedudukan sebelum kemalangan saya boleh nampak lampu dari Klang ke Kuala Lumpur.

The court's attention was drawn to the fact that no evidence was led to support the contention that the appellant was then driving in the wrong lane and had beaten the traffic lights (p 47 of the appeal record).

The appellant has categorically stated that at the material point of time, on approaching the junction, the traffic light was not red, but green, in his favor. From a distance of about one chain, he saw the respondent crossing the road from right to left and that the respondent then suddenly retreated backwards. He tried to avoid her by braking but could not stop in time and collided into her.

The appellant counsel also highlighted the fact there was no evidence before the court that the appellant was in the wrong lane at the material point of time. That it was never put to the appellant in cross-examination that he was in the right lane at the material point in time.

Counsel was of the view that the defendant's version was the more probable version. The defendant was then travelling on the left lane. Taking into consideration, the admission by the respondent of seeing a light of the oncoming car from the direction of Klang, that she did not wait for the oncoming car to pass but chose to cross the road although it was then not safe for her to do so, subsequently changing her mind and retreating back, causing the appellant to knock into her as he could not break in time.

As to the sketch plan which was not produced, the broken glass pieces 'X' was not necessarily indicative of the point of impact as it could have been flung as an aftermath of the accident. Reference was made to the case of *Mat Desa bin Salleh v Ang Hok Lee & Anor* [1979] 1 MLJ 241 at p 242 as authority for this proposition.

She was accordingly of the view that, as the respondent has not discharged the burden of proof which rests upon her, and the appellant's version is the more probable version, she urged the court to apportion liability 50–50 if the court is still minded to rely on the sketch plan and key to sketch plan. Alternatively, she urged this court to dismiss the respondent's case in the event of the court not admitting the sketch plan as evidence.

The respondent counsel's submissions

The respondent counsel in his submission conceded that the maker of the sketch plan should have been called in this case. Be that as it may, he urged this court to uphold the magistrate's decision and to dismiss this appeal with costs.

He drew the courts attention to the respondent's evidence at pp 47–50 of the appeal record and p 51 of the appeal record in respect of admission by the appellant of the summons being compounded. He then drew the court's attention to several authorities and then contended that *res ipsa loquitor* applies.

Findings

Firstly, on the issue of whether the magistrate was right in taking into consideration the sketch plan and key to sketch plan having regard to the fact that the document was only admitted as to authenticity and its contents not admitted, and its maker not being called as a witness, as well as by reason of the respondent counsel conceding that it had not been properly produced, I am in agreement with the appellant counsel's submission that the magistrate had erred in taking into consideration this document in making a considered decision in this case.

As to the traffic summons to which the appellant had agreed had been compounded, I am in agreement with the appellant's counsel that it is still incumbent upon this court to make a considered decision based on the totality of the evidence adduced before it.

I also agree with the appellant counsel's submission that if indeed the respondent's case was that the appellant was then driving on the wrong lane, during trial, this allegation should have been expressly 'put' to the appellant in cross-examination. The respondent's counsel failure to do so in my view has prejudiced the appellant.

Coming on to the probabilities of this case, taking into consideration the fact that the respondent had admitted to seeing the light of the oncoming car before crossing, she clearly took a calculated risk in crossing the road when it was unsafe for her to do so. I hold that she was equally duty bound to take due care and attention not t cross the road in the face of the oncoming car. That in considering the probabilities of this case, I hold that the appellant's version was more probable.

In the circumstances of this case, I am of the view that the magistrate had erred in taking into consideration evidence n properly produced before the court and had also failed to give critical appreciation of the evidence given by the witnesses and test with the probabilities of this case. I am of the view that his finding was against the weight of evidence.

In these circumstances, it is my finding that the magistrate erred in holding that the appellant was 100% liable and that liability the accident should be apportioned equally, 50:50 as against the appellant and the respondent.

The appeal was accordingly allowed with costs.

Appeal allowed with costs and liability apportioned equally.

Reported by Sivapragasam Kumaran